IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX REFERENCE NO.414 OF 1985

1. Yezdi Hirji Malegam, a Chartered Accountant and a partner of M/s.S.B. Bimmimoria & Co., having his office at Meher Chambers, R. Kamani Marg, Ballard Estate, Mumbai - 1.

2. Darius Cawasji Shroff, an Advocate and Solicitor of this Bombay High Court and a partner of M/s. Crawford Bayley &Co., Advocates & Solicitors, having his office at State Bank of India Bldg., N.G.N. Vaidya Marg, Mumbai - 400 023.

3. Pesi Shavak Patel, a Businessman having his office at M/s.Patel Bros., Elphinstone Building, Veer Nariman Road, Mumbai - 400 001.

4. Cyrus Shavak Patel, a Businessman having his office at M/s.Patel Bros., Elphinstone Building, Veer Nariman Road, Mumbai - 400 001.

all of Bombay, Indian Inhabitants, the Executors and Trustees of the last will dated 8th April, 1996 of Mr.Shavak Pestonji Patel, the original Applicant, who died at Bombay .. Appellants.

V/s.

The Commissioner of Income-tax, Bombay City III, Bombay .. Respondent.

Mr.J.D. Mistry with Ms.S. Vedpathak i/by Manekshah & Sethna for the Appellants.

Mr.A.S. Rao for the respondent.

CORAM : F.I. REBELLO & J.P. DEVADHAR, JJ.

JUDGMENT RESERVED ON : 8TH AUGUST, 2007.

JUDGMENT PRONOUNCED ON : 27TH AUGUST, 2007.

ORAL JUDGMENT : (Per J.P. Devadhar, J.)

1. At the instance of the applicant-assessee, the Income Tax Appellate Tribunal, Mumbai has forwarded the following questions of law for the opinion of this Court under Section 256(1) of the Income Tax Act, 1961.

> 1. Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that credit for the tax deducted at source from the dividends was to be given to the firm and not to the partners ?
>
> 2. Whether, on the facts and in the circumstances of the case, if the credit for the entire tax was not to be given to the partners, if there was any tax deducted at source remaining unabsorbed after meeting the tax liability of the firm, whether such tax should be apportioned among the partners and credit for such tax should be given to them in their individual assessments ?
>
> 3. Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the Commissioner (Appeals) cannot entertain an appeal with regard to the quantum/waiver of the interest levied under section 139(8) and 217(1A) of the Income-tax Act, 1961 ?

2. The assessment years relevant herein are assessment years 1972-73 and 1976-77.

3. The original assessee Shri S.P. Patel (hereinafter referred to as 'the assessee') and his brother were partner in a firm known as M/s.Patel Brothers having 50% share each in the profit and loss of the firm.

4. The assessee held several equity shares of limited companies from which dividend income was received.

5. Upto and inclusive of A.Y. 1971-72, the assessee was given credit of tax deducted at source (TDS) from the dividend income. However, for the assessment years in question namely A.Y. 1972-73 and 1976-77, the Income Tax Officer declined to give credit of TDS from dividend income to the assessee on the ground that the shares belonged to the firm and accordingly held that that the firm is entitled to the credit of the TDS amount.

6. The assessee filed appeals before CIT (A) contending that the credit for the TDS from the dividend income should be given to the assessee. However, the CIT (A) rejected the contention of the assessee and upheld the order of the I.T.O.

7. On further appeal filed by the assessee, the Income Tax Appellate Tribunal following its decision

in the case of the assessee for A.Y. 1974-75 upheld the order of CIT (A). On a reference application filed by the assessee, the Tribunal has forwarded the aforesaid questions of law for the opinion of this Court.

8. During the period relevant to A.Y. 1972-73, the provisions relating to the availability of credit of the TDS to the firm / partners were contained in Section 199 of the Act and Rule 30A of the Income Tax Rules, 1961. The said provisions, to the extent relevant for the purpose herein, read thus :

"Credit for tax deducted.

199. Any deduction made in accordance with the provisions of sections 192 to 194, section 194A, Section 194B, Section 194BB, section 194C, section 194D and section 195 and paid to the Central Government shall be treated as a payment of tax on behalf of the person from whose income the deduction was made, or of the owner of the security or of the shareholder, as the case may be, and credit shall be given to him for the amount so deducted on the production of the certificate furnished under section 203 in the assessment (including a provisional assessment under section 141A), if any, made for the immediately following assessment year under this Act :

Provided that -

(i) in a case where such person or owner or shareholder is a person whose income is included under the provisions of section 60, section 61, section 64, section 93 or section 94 in the total income of another person, the payment shall be deemed to have been made on behalf of, and the credit shall be given to, such other person;

(ii) in any other case, where the dividend on any share is assessable as the income of a person other than the shareholder, the payment shall be deemed to have been made on behalf of, and the credit shall be given to, such other person in such circumstances as may be prescribed :

Provided further that ....."

"30A. Credit for tax deducted at source to a person other than the shareholder in certain circumstances. - (1) Subject to the provisions of sub-rule (2), where the dividend on any share is assessable as the income of a person other than the shareholder, any deduction made in accordance with section 194 and paid to the Central Government, shall be deemed to be a payment of tax on behalf of, and the credit in respect thereof shall be given to, such other person in the circumstances specified below, namely :-

(i) --------

(ii) --------

(iii) --------

(iv) --------

(v) --------

(vi) -------

(vii) where the shares owned by a firm are held in the name of any of its partners;

(viii) -------

(ix) -------

(x) --------

(2) The credit referred to in sub-rule (1) shall not be given unless the person entitled to such credit furnishes to the Income-tax Officer a declaration in Form No.15B made by him and the shareholder concerned, together with a certificate of deduction of tax at source in Form No.19."

9. Mr.Mistry, learned counsel appearing on behalf of the assessee submitted that in the present

case, admittedly the shares from which dividend income was earned stood in the name of the assessee, TDS certificates issued by the company stood in the name of the assessee and moreover, admittedly the dividend income has also been assessed in the hands of the assessee. He submitted that the first proviso to Section 199 comes into operation only if the dividend income is to be taxed in the hands of a person other than the share-holder. In the present case, since the dividend income is taxed in the hands of the assessee, neither the first proviso to Section 199 of the Act nor Rule 30 A of the Income Tax Rules are applicable. Consequently, Mr.Mistry submitted that the credit of TDS from the dividend income could not be denied to the assessee. With reference to the order of the I.T.A.T. for A.Y. 1974-75 is concerned wherein credit of TDS from dividend income was denied to the assessee, Mr.Mistry submitted that the matter being very old, the assessee is unable to furnish the reasons for not challenging the said order. However, Mr.Mistry submitted that the fact that the assessee has not challenged the order of Tribunal for A.Y. 1974-75 would not bar the assessee from agitating the said issue in the assessment years in question.

10. Mr.Rao, learned counsel appearing on behalf of the revenue while supporting the order of the

Tribunal submitted that admittedly the order passed by the Tribunal in A.Y. 1974-75 against the assessee has attained finality and, therefore, it is not open to the assessee to contend that the assessee is entitled to the credit of the TDS instead of the firm. Mr.Rao further submitted that on a plain reading of Section 199 of the Act read with Rule 30A (vii) of the Income Tax Rules, it is clear that where the shares belong to a firm but are held in the name of any of its partner, then credit of TDS shall be given to the firm and not to the partner in whose name the share stands. Accordingly, Mr.Rao submitted that there is no infirmity in the orders passed by the authorities below and the questions referred by the Tribunal be answered in favour of the Revenue.

11. We have carefully considered the rival submissions. Under Section 199 of the Act, credit of Tax deducted at source from the dividend income and paid to the Central Government is given to the share-holder. However, the First proviso to Section 199 carves out an exception to the above principle. In this case, we are concerned with clause (ii) to the first proviso to Section 199 of the Act. The said clause provides that where the dividend income is assessable as an income of a person other than the share-holder, then, the tax deducted at source

shall be deemed to have been made on behalf of such other person and the credit of such tax deducted at source shall be given to such other person in the circumstances as may be prescribed. Rule 30A of the Income Tax Rules sets out the circumstances under which credit for TDS shall be given to a person other than the share-holder. Clause (vii) of Rule 30A provides that where the shares owned by a firm are held in the name of its partners, then credit of the TDS shall be given to the firm and not to the share-holder. Thus, the first proviso to Section 199 of the Act read with Rule 30A of the Income Tax Rules inter alia provide for giving credit of tax deducted at source to the firm where the the dividend income is to be taxed in the hands of the firm and not the shareholder.

12. In the present case, the dividend income is admittedly taxed in the hands of the assessee/ shareholder. Once the dividend income is assessed in the hands of the assessee / share-holder, the proviso to Section 199 of the Act would have no application and consequently denying the credit of TDS to the assessee / shareholder does not arise at all. As stated earlier, the first proviso to Section 199 of the Act read with Rule 30A of the I.T. Rules apply inter alia, where the dividend income is to be taxed in the hands of a person other

than the shareholder. As the case of the assessee falls in the first part of Section 199 of the Act, the assessee could not be denied credit of TDS by invoking the first proviso to Section 199 of the Act read with Rule 30A of the Income Tax Rules.

13. The fact that the Tribunal in the A.Y. 1974-75 has denied credit of TDS to the assessee / shareholder and the assessee has not challenged the same would not make any difference. Moreover, it is not known as to whether, in A.Y. 1974-75 the dividend income was taxed in the hands of the firm or the partners. Nothing is brought to our notice that in A.Y. 1974-75 the dividend income taxed in the hands of the firm. However, in the present case, admittedly the dividend income taxed in the hands of the assessee/shareholder. Therefore, denial of credit of TDS based on the decision of the Tribunal in the case of the assessee for A.Y. 1974-75 cannot be sustained.

14. Accordingly, the question No.1 referred to us is answered in the negative i.e. in favour of the assessee and against the revenue. In view of our answer to question No.1, the question Nos.2 and 3 became academic.

15. In the result, the reference is disposed of

by answering question No.1 in favour of the assessee and against the revenue and returning Question Nos.2 and 3 unanswered.

(F.I. REBELLO, J.)

(J.P. DEVADHAR, J.)